SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 342

JEROME HENRY, AS SUPERINTENDENT OF THE INDIANA STATE REFORMATORY,
Petitioner,

vs.

CHARLES O. COTNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. DILLON
Attorney General of Indiana

DOUGLAS B. McFADDEN
Assistant Attorney General

REX P. KILLIAN
Deputy Attorney General

Attorneys for Petitioner

219 State House
Indianapolis, Indiana
633-5512

C. E. Pauley & Co., Inc., Indianapolis

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No. ——

JEROME HENRY, AS SUPERINTENDENT OF THE INDIANA STATE REFORMATORY,
Petitioner,

vs.

CHARLES O. COTNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on April 17, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported. Such opinion of the District Court is unreported. Such opinions are appended hereto (Appendix p. 13).

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 17, 1968. The petition for rehearing was denied on May 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the District Court and holding that the respondent Cotner had exhausted his state court remedies under 28 U.S.C. § 2254.

a. Whether the respondent Cotner may by-pass the mandates of 28 U.S.C. § 2254, requiring exhaustion of state remedies, by alleging that the sodomy statute, under which he alleges to be unconstitutional, has already been held constitutional by the highest court of Indiana.

b. Whether a motion to vacate the conviction and withdraw the plea of guilty would be available to respondent Cotner in the state trial court thereby constituting an "available State corrective process" under 28 U.S.C. § 2254.

2. Whether the conviction of respondent Cotner for sodomy upon his wife, where the affidavit was signed by his wife, violated his constitutional right to privacy.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Burns IND. STAT. ANN. § 10-4221, provides:

> "Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and, on conviction, shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), to which may be added imprisonment in the state prison not less than two (2) years nor more than fourteen (14) years."

28 U.S.C. § 2254 provides:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the reme-

dies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

Amendment 4 to the Constitution of the United States, provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment 9 to the Constitution of the United States, provides:

"The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

Amendment 14 to the Constitution of the United States, provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

This action was brought in the United States District Court for the Southern District of Indiana on a Petition for Writ of Habeas Corpus for Charles O. Cotner's release from custody, for alleged violations of his federal constitutional rights, against the Superintendent of the Indiana State Reformatory.

The habeas corpus petition was filed on June 7, 1967. The Superintendent of the Reformatory on June 22, 1967, filed a Motion to Dismiss or in the Alternative for Summary Judgment. The District Court on August 25, 1967, entered an order dismissing the petition. (Appendix p. 25). An appeal was perfected by Cotner from that decision. The court of Appeals on April 17, 1968, reversed the decision of the District Court. (Appendix p. 17).

The exhibits that were attached to the habeas corpus petition reveal that Cotner was charged by criminal affidavit with sodomy in the Circuit Court for Jasper County, Indiana, on July 24, 1965. The affiant was Jeane Cotner, wife of the accused. The transcript of the arraignment, also attached as an exhibit, reveals that Cotner entered a plea of guilty to the charge after being fully advised of his rights. The Circuit Court sentenced him to a term of 2-14 years in the Indiana State Reformatory and a fine of $5.00 and costs.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON THE EXHAUSTION OF STATE COURT REMEDIES REQUIREMENTS OF THE FEDERAL HABEAS CORPUS STATUTE

Cotner never made an attempt to present his alleged federal questions in this case to the Indiana courts. Instead they were first presented to a federal district court. The District Court held as one of the grounds for dismissing the petition that Cotner had failed to exhaust his state court remedies. The Court of Appeals however reversed the District Court on this point.

The two-fold exhaustion question alone involves issues of such magnitude as to merit review by this Court on the merits.

One of the grounds relied upon by Cotner for not presenting his contentions to the Indiana courts was because allegedly the Supreme Court of Indiana had already passed upon the questions surrounding the constitutionality of Indiana sodomy statute and any presentation would be futile. While it is true that the Supreme Court of Indiana has on two different occasions sustained the statute against charges of vagueness, *Phillips* v. *State*, —Ind.—, 222 N.E.2d 821 (1967) and *Estes* v. *State*, 244 Ind. 691, 195 N.E.2d 471 (1964), it does not mean that it would not be susceptible to more direct argument on the question in a subsequent case or to a charge of unconstitutionality on some other ground, *i.e.*, right to privacy.

This Court has held that constitutional contentions of a habeas corpus petitioner must be presented once to the states courts under 28 U.S.C. § 2254. *Brown* v. *Allen*, 344 U.S. 443 (1953).

The Court of Appeals decision however did not turn on this point but upon the question of whether Cotner could have presented his contentions by way of a motion to vacate the judgment and withdraw his plea of guilty under *Pritchard* v. *State*, 246 Ind. 671, 210 N.E.2d 372 (1965).

The District Court held that the motion to vacate was available to Cotner under *Pritchard*. The Court of Appeals said that the motion must be presented within term time under *Snow* v. *State*, 245 Ind. 423, 199 N.E.2d 469 (1963) and the term at which Cotner's plea was entered has ended.

Judge Duffy however answers this argument in his dissenting opinion by pointing out that the language of the Supreme Court of Indiana in *Koepke* v. *Hill*, 157 Ind. 172, 60 N.E. 1039, 1041 (1901), reflects Indiana's lack of hesitancy to follow decisions of this Court in providing post-conviction means of reviewing federal constitutional questions. Indiana has, particularly since *Lane* v. *Brown*, 372 U.S. 477 (1963), made a good faith effort at providing adequate means by which prisoners can present federal constitutional questions subsequent to conviction and direct appeal. This is borne out when Indiana Supreme Court Rules 2-40 and 2-40A are viewed in light of *Case* v. *Nebraska*, 381 U.S. 336 (1965). Further it must not be forgotten that the States are free to adopt their own measures of post conviction review, if they are constitutionally required to do so at all. *Hysler* v. *Florida*, 315 U.S. 411 (1942). But to inject this receptive attitude, the Indiana Supreme Court must first be given the opportunity of reviewing petitioner's constitutional contentions and this cannot occur if he is not required to present those contentions before the state court.

The language in *Pritchard* indicates that the motion to vacate and withdraw the guilty plea may be made after term time has passed.

> "This court has held on numerous instances, without exception, that when a defendant pleads guilty in a criminal case and a judgment is rendered on the plea, *he cannot properly file a motion for new trial, as there never was a trial,* within the meaning of the statute, and such motion is ineffectual, the proper

remedy being a motion to vacate the judgment and withdraw the plea. [cites omitted].

> "It logically follows that a belated motion for new trial is not an appropriate remedy for errors preceding a judgment rendered on a plea of guilty, since there never was a trial. Rather, under such circumstances the appropriate remedy would be a petition to set aside the judgment and plea of guilty." 246 Ind. 673-674.

The key words in the foregoing language are "would be". The reference is to prospective use of the motion to vacate thereby indicating its availability after term time has passed.

In the final analysis the question is whether Cotner should have attempted to present his constitutional questions by a motion to vacate the judgment and withdraw the guilty plea. The Court of Appeals said no on the grounds that he did not have to speculate on future changes in Indiana law. But should not an applicant first make an attempt to present his position to the courts and even if necessary attempt to change the law? May an applicant by-pass the requirements of 28 U.S.C. § 2254 because the current status of state law may not *appear* favorable to his contentions?

These are important questions which deserve the attention and clarification of this Court.

II.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, I.E. THE APPLICATION OF THE RIGHT TO PRIVACY DOCTRINE TO THE INDIANA SODOMY STATUTE

The Court of Appeals also erroneously held that the right to privacy doctrine of *Griswold* v. *Connecticut*, 381 U.S. 479

(1965) applies to the Indiana sodomy statute being Burns IND. STAT. ANN. § 10-4221.

Griswold involved a statute making the use of contraceptives unlawful. The majority decision of the Court of Appeals is a far reaching extension of *Griswold* that is unwarranted by the facts of the case at bar.

The Court of Appeals is now suggesting that the crime of sodomy, the establishment of which finds its roots deeply embedded in common law and the constitutionality of which, when committed between other than married persons, would surely not be questioned by this Court, should now provide an exception when the offense is committed between married persons in the privacy of the bedroom. If the views of the Court of Appeals are followed, married persons would be shielded from prosecution of an age old crime while others committing the very same activity would be subject to prosecution. Following this rationale, what other crimes would the constitutional right to privacy make inapplicable to married persons? Where would courts draw the line? Whether a man beats his child, a stranger or his wife, the activity still constitutes the crime of assault and battery. Whether a man shoots his child, a stranger or his wife, the activity still constitutes the crime of murder. Likewise whether a man commits the *crime* of sodomy with his child, a stranger or his wife, the *activity* still constitutes the crime of sodomy. A husband and wife's right to privacy should not shield them from what would otherwise be a criminal act.

Pervading the majority opinion of the Court of Appeals is the idea that force and consent are essential factors in reaching their decision. They concede that only private, *consensual* marital relations are protected under *Griswold* and that the Indiana courts might hold *Griswold* inapplicable upon a showing that the marital relations were ac-

complished by *force.* They further note with apparent significance that Cotner was not charged with using *force,* the statute does not mention *force* and Cotner was not given notice of a defense of *consent.* As Judge Duffy notes in dissent, these theories are unwarranted.

The Indiana court has defined the crime of sodomy as "the abdominable and detestable crime against nature with mankind or beast" which includes both common law sodomy and acts of a beastial character whereby degraded and perverted sexual desires are sought to be gratified contrary to nature. *Murray* v. *State,* 236 Ind. 688, 143 N.E.2d 290 (1957). The crime of sodomy as set forth in the Indiana statute is essentially a codification of the common law crime as outlined in 4 *Blackstone Commentaries* 215.

Since Indiana has adopted the common law crime in essence, we must look to that source to ascertain its elements. At common law, *force* was not an element of the offense and *consent* was no defense. Consent simply made the consenting party an accomplice. *Bishop, Criminal Law* § 1193 (9th ed. 1923); 20 *Am. & Eng. Ency. of Law* 1147 (new ed.); *Russell, Law of Crimes* 977 (7th Eng. ed. & 1st Canadian ed. 1910); 1 *Russell, Crimes and Misdemeanors* 939 (8th ed. 1923); 2 *Wharton, Criminal Law and Procedure* § 754 (1957). In *Bishop, supra,* it is also recognized that sodomy may be committed between married persons. (citing *Reg.* v. *Jellyman,* 8 Car. & P. 604).

Other state supreme courts have reiterated these common law rules when confronted with similar statutes. *Commonwealth* v. *Poindexter,* 133 Ky. 720, 118 S.W. 943 (1909); *People* v. *Elder,* 382 Ill. 388, 47 N.E.2d 694 (1943); *State* v. *Langelier,* 136 Me. 320, 8 A.2d 897 (1939); *State* v. *Pfeiffer,* 277 Mo. 202, 209 S.W. 925 (1918); *State* v. *Weitzel,* 157 Or. 334, 69 P.2d 958 (1937).

Based on the above analysis, the Court of Appeals' emphasis on force and consent is definitely unwarranted and should compel a re-evaluation. Sending the case back to the Indiana courts would be of no avail in light of the above.

There is still another reason why the constitutional right to privacy should not be applicable to this case. Unlike *Griswold*, the prosecuting witness in this case is the defendant's wife. The area of privileged marital communications and testimony is analogous to the marital right to privacy. Exceptions to these privileges have existed since common law to cover any crime committed by one spouse against the other. The exception was ably stated by Judge Learned Hand in *United States* v. *Walker*, 176 F.2d 564, 568 (2nd Cir. 1949):

> "We do not forget that a wife from the earliest times was competent to testify against her husband, when the crime was an offense against her person . . . . The same exception probably extends to the privilege against the admission of confidential communications."

See 2 *Wigmore, Evidence*, § 488, 8 id., §§ 2239, 2240; Uniform Rule of Evidence 28 (2).

Privileged communications between husband and wife is nothing more than a protection of the right to privacy between husband and wife. As the privilege breaks down when a spouse is the injured party, so too should the right to privacy when the spouse is the injured party.

In the final analysis the majority opinion of the Court of Appeals constitutes what that court considers the law should be, as reflected by its reference to the Model Penal Code, rather than what the law is. The question of whether acts of sodomy committed in private by consenting adults should be a crime is a matter for the legislature and not one with any constitutional underpinnings.

CONCLUSION

The Court of Appeals has decided federal questions in a way in conflict with decisions of this Court as well as important questions of constitutional law not heretofore decided by this Court. These constitute sound basis under Rule 19 of this Court to grant a writ of certiorari.

Further, the Court of Appeals' decision has significant impact upon Indiana criminal law. Indiana should therefore be given an opportunity as one of the soverign members of the Union to present its legal position to this Court for review.

WHEREFORE, for the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN J. DILLON
Attorney General of Indiana

DOUGLAS B. MCFADDEN
Assistant Attorney General

REX P. KILLIAN
Deputy Attorney General

Attorneys for Petitioner

219 State House
Indianapolis, Indiana
633-5512

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IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 16601 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

CHARLES O. COTNER,
Petitioner-Appellant,

v.

JEROME HENRY, as Superintendent, Indiana State Reformatory,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

APRIL 17, 1968

Before DUFFY, *Senior Circuit Judge,* KILEY and FAIRCHILD, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal from the district court's judgment dismissing Cotner's habeas corpus petition challenging the constitutionality of the Indiana Sodomy Statute under which he had been convicted. The court dismissed on the grounds that Cotner had not exhausted his state remedies and that his petition had no merit.

We reverse because we have concluded that Cotner has no adequate method for raising his constitutional argument under Indiana procedural rules and because we have also concluded that there is a substantial question as to the constitutionality of the Indiana Sodomy

Statute as applied in this case which Cotner was not informed of prior to his plea of guilty, thereby rendering his plea of guilty void as not understandingly made.

Cotner pleaded guilty in the Jasper County, Indiana, Circuit Court in July, 1965, to his wife's charge that in May of 1965 he had committed "the abominable and detestable crime against nature" with her in violation of the Sodomy Statute.[1] He was sentenced to not less than two nor more than fourteen years in the state reformatory. The petition before us was filed in June, 1967.

Inadequacy of State Remedies

We think the district court erred in dismissing Cotner's petition for failure to exhaust his state remedies.

The petition challenges the Indiana Sodomy Act as being unconstitutionally vague, and an unwarranted invasion of marital privacy, under the Fourteenth Amendment. A state prisoner, to obtain habeas corpus relief, is required, under 28 U.S.C. 2254, to exhaust available state remedies unless there is no "available State corrective process" or circumstances which make the process ineffective to protect his rights. If Cotner had the right under Indiana law to raise by "any available procedure" the point he urges here, he has not exhausted his state remedies and is not entitled to relief. *Jones v. Dowd*, 128 F.2d 331.

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[1] BURNS IND. STAT. Ch. 169 Sec. 10-4221:
Whoever commits the abominable and detestable crime against nature with mankind or beast; or whoever entices, allures, instigates or aids any person under the age of twenty-one (21) years to commit masturbation or self-pollution, shall be deemed guilty of sodomy, and, on conviction, shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) to which may be added imprisonment in the state prison not less than two (2) nor more than fourteen (14) years.

The State argues that Cotner has not complied with Sec. 2254 because he did not present his constitutional challenge to the Indiana courts either by way of appeal, *coram nobis,* belated motion for new trial under Indiana Superior Court Rule 2-40, or motion to vacate the conviction and withdraw his plea of guilty. Cotner argues however that these remedies "are absolutely ineffective" for his purpose.

Since Cotner pleaded guilty, he was in no position to appeal, *Snow v. State,* 199 N.E.2d 469, and *coram nobis* was abolished in Indiana in 1963 by amendment to Rule 2-40. *Id.* Since the conviction was upon the plea of guilty, "he cannot properly file a motion for new trial, as there never was a trial, within the meaning of the statute. . . ." *Pritchard v. Indiana,* 210 N.E.2d 372, 373.

Despite ambiguous language in *Koepke v. Hill,* 60 N.E. 1039, 1041, the Supreme Court of Indiana in *Dowd v. Grazer,* 116 N.E.2d 108, held that habeas corpus is not available to a prisoner to test the constitutionality of a statute because a conviction, even on an unconstitutional statute, is merely erroneous and is not a jurisdictional defect.

There remains the suggested remedy of motion to vacate the judgment and withdraw the plea. But the Supreme Court of Indiana holds that this motion must be made within the term at which the plea is entered. *Snow v. State,* 199 N.E.2d 469, 471; *Sessler v. State,* 56 N.E.2d 851; *Kuhn v. State,* 52 N.E.2d 491. The term at which Cotner's plea was entered has ended.

Indiana argues that Cotner should be precluded now from claiming he has exhausted his Indiana remedies because he has made no attempt to seek post-conviction relief in the Indiana courts. It is possible that, despite the present state of Indiana law, had Cotner sought

relief in Indiana he would have been permitted to challenge his conviction in the manner that he does in this habeas corpus petition. We think, however, that we must base our decision upon the law as it stands today, rather than on conjecture about future changes in that law.

Constitutional Questions

Cotner attacks the Indiana Sodomy Statute on the ground that it violates Article I, Sec. 12 of the Indiana Constitution, and the Fourteenth Amendment of the United States Constitution, because it is vague and because, as applied, it violates his right of privacy under the Supreme Court decision in *Griswold v. Connecticut*, 381 U.S. 479.[2] In *Griswold* the Supreme Court recognized a constitutional right to marital privacy and held that the right is violated by the imposition of criminal sanctions for the use of birth control devices by married couples. The import of the *Griswold* decision is that private, consensual, marital relations are protected from regulation by the state through the use of a criminal penalty.[3]

No appellate court in Indiana has had the opportunity to interpret the Indiana Sodomy Statute in light of its potential application to the privacy of married couples. Under *Griswold* Indiana courts could not interpret the statute constitutionally as making private consensual

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[2] We think that Cotner has standing to complain about Indiana's intrusion into the privacy of Cotner's marriage relation, even though his wife has made the complaint against him. It is essential to the preservation of the right of privacy that a husband have standing to protect the marital bedroom against unlawful intrusion.

[3] The American Law Institute Model Penal Code adopts the view that consensual private sexual conduct between adults should not ordinarily be subject to criminal sanction. Illinois, as well as many other states, has adopted this approach, although Indiana has not as yet joined the trend.

physical relations between married persons a crime absent a clear showing that the state had an interest in preventing such relations, which outweighed the constitutional right to marital privacy. The Indiana courts might, however, construe the statute as being inapplicable to married couples or as outlawing such physical relations between married couples only when accomplished by force. Under the latter interpretation, the protection of the *Griswold* rule would not be available to Cotner if there was a showing that Cotner employed force.

Cotner was charged by his wife, in an affidavit, with the commission of an act of sodomy. The affidavit contained no charge that he used force. He was prosecuted under a statute which prohibits sodomy but which does not explicitly mention force and which no Indiana court has construed as requiring force when applied to married couples in the privacy of the bedroom. The circumstances revealed by the present record show that Cotner was not given adequate notice of any allegation, or any need of an allegation, of force, or of a defense of consent. The charge was merely read to him.

He was allowed to waive his right to counsel and to plead guilty without being informed that there was a substantial question, later revealed by *Griswold*, whether certain acts by married people with mutual consent can constitutionally be prohibited by the state.

Because of these circumstances, Cotner's conviction must be vacated as based on a plea of guilty which was not made with a full understanding of the charge against him.

The decision of the district court is reversed and the cause is remanded with instructions to grant the writ and order that Cotner be released from custody unless the state proceeds with prosecution of its charge within a reasonable time. This procedure could, if prosecution,

conviction and appeal followed, give the Indiana courts an opportunity to resolve the substantial constitutional questions which may be involved in Cotner's case.

Judgment reversed and cause remanded with directions.

No. 16601

DUFFY dissents: I respectfully dissent. Cotner did have the opportunity to withdraw his plea of guilty and move that the judgment be vacated within the term at which the plea was entered. He failed to exercise that remedy. Faced with a similar problem, the Fourth Circuit, in *Whitley v. Steiner*, 293 F.2d 895, 898, 899 (1961), stated: ". . . Where a state prisoner, asserting a denial of constitutional rights in connection with his conviction, has a remedy in the state court but fails to avail himself of it, and later finds himself without a state remedy, he may not have redress through federal habeas corpus." See also *Brown v. Allen*, 344 U.S. 443, 482-487 (1953).

To grant Cotner relief as the majority opinion does, would seem to assert that federal courts have broad supervisory powers over the manner in which state courts handle criminal prosecutions for violations of state laws. I disagree.

In *Koepke v. Hill*, 60 N.E. 1039, 1041, an Indiana case, the court said: "If a federal question were duly presented, we would be constrained to follow the decisions of the Supreme Court of the United States." But Cotner never gave the Indiana courts any opportunity to pass on the issue.

The majority opinion concedes that it is possible that if Cotner had sought relief in the Indiana courts, he would have been permitted to challenge his conviction in the

manner in which he does in the instant habeas corpus petition.

The majority opinion injects the idea that the state should have shown that Cotner used force. I think such a theory is entirely unwarranted.

I take it that if Cotner had shot his wife in the privacy of their bedroom, the majority of the panel which heard this appeal would not proclaim that there is a difference between a crime committed in the bedroom and otherwise. I take it that in such a case there would be no claim of ". . . an unwarranted invasion of marital privacy under the Fourteenth Amendment." I also assume that under such circumstances there would be no claim that Cotner's conduct could not be questioned because, as the majority states "it is essential to the preservation of the right of privacy that a husband have standing to protect the marital bedroom against unlawful intrusion."

I would affirm the District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHARLES O. COTNER

v.

JEROME HENRY, *as Superintendent of the Indiana State Reformatory*

No. IP 67-C-248

ENTRY ON MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

Petitioner was convicted of sodomy entered upon a plea of guilty by the Jasper County Circuit Court in vacation before the September term of 1965. He has petitioned for habeas corpus alleging violations of his right to counsel and the unconstitutionality of the Indiana sodomy statute. The Attorney General of Indiana has moved to dismiss the petition on the grounds that the petition fails to state a claim upon which relief can be granted, and that state court remedies have not been exhausted.

The petitioner's allegation of a denial of the assistance of counsel are defeated by the transcript attached as an exhibit to his petition. Court-appointed counsel was offered and refused. The trial court found the waiver of counsel to be valid, and there is no support in the petition to cast doubt upon that ruling.

The Indiana sodomy statute reads in pertinent part as follows:

> "Whoever commits the abominable and detestable crime against nature with man or beast . . . shall be guilty of sodomy." Ind. Ann. Stat. § 10-4221.

Petitioner first challenges the statute on the grounds of vagueness.

"The test is whether the language conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice." *Jordan v. DeGeorge*, 341 U.S. 223, 231-232 (1951). The present statute does put men of common understanding upon notice of what is prohibited, and this is true notwithstanding the variety of activities the artful mind of counsel is able to list as being within the statute's scope. Furthermore, specificity has been enhanced by case law interpretations, *e.g., Sanders v. State*, 25 N.E.2d 995 (1940), and the requirement of proof of mens rea mitigates the danger of any remaining vagueness. *Screws v. United States*, 325 U.S. 91 (1945).

Petitioner also attacks the statute's constitutionality as applied to the present case. The prosecuting witness was petitioner's wife, and it has been contended that such fact results in a violation of a right of marital privacy. Petitioner's reliance upon *Griswold v. Connecticut*, 381 U.S. 479 (1965), is misplaced. In that case the state instituted the criminal processes. The present case proceedings began with a complaint made by one of the parties to the marital relationship. Privacy is not infringed when one of the parties comes forward with the information and makes complaint.

The petition discloses a failure to exhaust state remedies as required by 28 U.S.C. § 2254. Contentions have been made challenging the constitutionality of Indiana post conviction remedies by way of habeas corpus and motions for new trials. Were there merit in petitioner's claims, his proper state remedy would be a motion to vacate the judgment and withdraw his plea of guilty. *Pritchard v. State*, 210 N.E.2d 372 (1965).

The petition is dismissed as being without merit and for failure to exhaust state remedies.

IT IS SO ORDERED.

Dated this 25th day of August, 1967.

WILLIAM E. STECKLER
Judge, United States District Court

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In the

Supreme Court of the United States

OCTOBER TERM, 1968

JEROME HENRY, As Superintendent of the Indiana State Reformatory,

Petitioner,

vs.

CHARLES O. COTNER,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM C. ERBECKER
707 Hornblower Building
129 East Market Street
Indianapolis, Indiana 46204
Attorney for Respondent

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

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The respondent in the above-captioned cause, Charles O. Cotner, by counsel, responds to the Petition For Writ of Certiorari which has been filed in this cause as follows:

The respondent does not dispute the "Opinions Below" nor the "Jurisdiction" portions of the petitioner's brief.

QUESTIONS PRESENTED

The first question which the petition is alleging to be presented presents an approach to this case which is very different from the approach taken by the petitioner in his Petition For Rehearing which he filed in the United States Court of Appeals for the Seventh Circuit where

it was contended at page four of the said Petition For Rehearing that the respondent has irredeemably failed to exhaust his state remedies because he failed to make use of certain remedies which had been available to him in the past. It is the respondent's position that the petitioner's first question presented should be phrased as follows:

1. Whether a convict who pleads guilty to an offense without counsel and without advisement as to the value of having counsel waives even questions effecting his fundamental rights by failing to file a motion to vacate plea within the term of court in which the plea is entered.

Respondent likewise denies that petitioner's second question presented constitutes an accurate phrasing of the issues herein and notes that the decision of the Seventh Circuit which appears at page 17 of the Petitioner's appendix contains the following ruling which appears at pages 21 and 22 of the said appendix:

> He was allowed to waive his right to counsel and to plead guilty without being informed that there was a substantial question, later revealed by Griswold, whether certain acts by married people with mutual consent can constitutionally be prohibited by the state.
>
> Because of these circumstances, Cotner's conviction must be vacated as based on a plea of guilty which was not made with a full understanding of the charge against him.
>
> The decision of the district court is reversed and the cause is remanded with instructions to grant the writ and order that Cotner be released from custody unless the state proceeds with prosecution of its charge within a reasonable time. This procedure could, if prosecution, conviction and appeal followed,

give the Indiana courts an opportunity to resolve the substantial constitutional questions which may be involved in Cotner's case.

The Seventh Circuit did not hold that the conviction of the Respondent violated his right to privacy as a matter of law (although footnote two of the Seventh Circuit's decision does contain a dictum to that effect). The holding was that the appellee had a valuable right to litigate the substantial constitutional question involved in the charges pending against him and he was not sufficiently advised prior to his plea of guilty to be held to have waived that valuable right. In view of this it is the Respondent's position that the second item in the "Questions Presented" section of the Petitioner's petition is not, in fact in issue before this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

To those statutes and amendments to the United States Constitution which the Petitioner has listed in the "Constitutional Provisions and Statutes Involved" portion of its petition the Respondent would add the following:

> Amendment 6 to the Constitution of the United States:
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

To the "statement of case" which has been submitted by the petitioner the Respondent would add certain facts to the Respondent's arraignment at which he pleaded guilty. All that the Petitioner's "statement of case" says regarding this arraignment is that "The transcript of arraignment also attached as an exhibit, reveals that Cotner entered a plea of guilty to the charge after being *fully advised of his rights.*" (Emphasis added) the Transcript of Arraignment which Petitioner states it has filed in this Court as an exhibit show five pages of dialogue between the Respondent and the trial judge covering the three occasions that the Respondent was in court up to the time of his sentencing. At the first hearing the trial judge advised the Respondent that he was charged with "the crime of sodomy" and the time and place it was alleged to have happened. The Court then asked Respondent if he had the money to hire an attorney and Respondent said that he did and that he expected to hire one after he had spoken with his father that evening. At the second hearing the trial judge asked the Respondent if he had hired an attorney and the Respondent replied that his father had been unable to obtain an attorney because "he didn't have the money." The Respondent then asked the trial court if his wife had not communicated the fact that she wished to drop the charge and the trial court replied that it would make no difference because the state and not the respondent's wife was the true plaintiff in interest. The trial court then asked the Respondent if he wanted the court to "employ" an attorney to represent him and the respondent replied: "No". The court then told the Respondent that the maximum penalty for the offense charged was two to fourteen years and read the complaining affidavit to him. The respondent then was asked if he pleaded guilty or not guilty and he replied:

"guilty, guilty." A pre-sentence investigation was ordered. On the third appearance the Respondent was sentenced to the maximum term after he was given the opportunity to express any legal reason why the court should not pronounce sentence. At no time was the Respondent advised of his right to an attorney at public expense, his right to a trial by jury, his right to subpoena witnesses, his right of confrontation and cross-examination or his right to a reasonable bail. The Respondent was in jail at all times yet there was no inquiry into the reasonableness of his bail in spite of the fact that the Respondent repeatedly complained that his bail was set too high and that his incarceration was preventing him from consulting with an attorney:

> Court: Well do you want me to employ an attorney to represent you?
>
> Respondent: Well I would like a chance to get out and talk to one. My bond is so high that I couldn't get out to talk to one.
>
> Court: Well I understand that, but do you want the Court to appoint an attorney to represent you?
>
> Respondent: No.
>
> Court: Well I want you to remember that I asked you if you wanted the Court to appoint an attorney for you.
>
> Respondent: Well I want to get out of jail. I've got five little kids at home and I want to get out and take care of them.
>
> Court: Well I understand that.

Contrary to the Petitioner's representation that Respondent was "fully advised of his rights" before he entered his plea of guilty the record shows that he was advised of nothing other than the maximum penalty and that it was implied to him that his plea of guilty would result in the termination of the matter and his release from confinement.

REASONS WHY WRIT SHOULD NOT BE GRANTED

If a writ of certiorari were granted herein the question of whether Indiana's Sodomy statute invades the constitutional right to privacy when made applicable to married couples would not truly be before the Court because it readily would be apparent that the Respondent's "arraignment" was totally illegal from a Constitutional standpoint because the Respondent was not only not advised as to any of his rights, he also was mis-advised by the trial court's statement that his wife's refusal to participate in the prosecution would have no effect upon the State of Indiana's contemplated prosecution. Like every other state, Indiana has a privileged communication statute covering the consented to and mutual activities of husband and wife (Indiana Acts 1881 (Spec. Sess.), ch. 38, sec. 275, p. 240) (Burns 2-1714) and every lawyer and judge knows that the doctrine of privileged communications prevents a successful prosecumtion for mutual marital acts committed in the privacy of the bedroom and that such a prosecution can succeed only where the defendant is mis-advised, tricked and cajoled or harassed into an improvident plea of guilty. Thus, if certiorari were granted in this cause it readily would be apparent that the question of the applicability of *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) to Indiana's Sodomy statute (Burns 10-4221) would be of no social importance because Indiana's privileged communication statute renders the sodomy statute inapplicable to mutual private marital acts in any prosecution where due process of law is afforded the accused.

The other contention presented by the Petitioner is that the Seventh Circuit has permitted the Respondent to deliberately by-pass adequate state remedies. This was not the Petitioner's contention in its Petition For Rehearing

before the Seventh Circuit. There the Petitioner urged that the Respondent had forever waived his rights in this matter by not filing a timely motion to withdraw plea of guilty:

> After entering a plea of guilty, Cotner could still have presented his claims by a motion to vacate the judgment and withdraw his plea of guilty as set forth in *Pritchard* v. *State*, ... Ind ....., 210 NE2d 372 (1965). Although this remedy was not available at the time he filed his application in federal court, it was a means by which the state courts *could have* passed on Cotner's constitutional contentions. (Emphasis added)
>
> *Petitioner's Petition For Rehearing*, pg. 4

The Respondent submits that it would be as irrational to hold that he waived all of his federal rights in this matter by not filing a motion to withdraw plea during the term of court as it would be to hold that he had waived them by entering his plea in the first place without advisement.

At page 6 of its petition the Petitioner contends that "Indiana has, particularly since *Lane* v. *Brown*, 372 U.S. 477 (1963) made a good faith effort at providing adequate means by which prisoners can present federal constitutional questions subsequent to conviction and direct appeal. This is borne out when Indiana Supreme Court Rules 2-40 and 2-40A are viewed in light of *Case* v. *Nebraska*, 381 U.S. 336 (1965)." At least two judges of the Indiana Supreme Court do not share the Indiana Attorney General's glowing opinion concerning Indiana Supreme Court Rules 2-40 and 2-40A as is shown by the following concurring opinion in a recent decision by that court:

> Hunter J. (concurring)
>
> I concur only in the result of this case for the following reasons:

This is another in a long series of cases which points up the absolute and pressing necessity for a revision of this Court's post-conviction remedy rules. This matter is now dealt with by Rules 2-40 and 2-40A of the Rules of the Supreme Court of Indiana.

It is my firm belief that, among the necessary modifications, provision must be made in these rules for an evidentiary record to be made during these post-conviction proceedings in the trial court to better enable this Court to review any allegation of abuse of discretion that may be made. Such an allegation is made in the present case but how are we to determine it properly when we have no record before us revealing what took place below? We must resort to presumptions in favor of the trial court with no other basis than some childlike faith in the inherent wisdom of that court. In the absence of a record in these post conviction proceedings, the burden of proof that is upon the petitioner in the court below becomes an almost irrebutable presumption on petition for writ of certiorari. For how can we say the court below committed an abuse of discretion if we have nothing before us from which we can determine the basis of the discretionary action complained of.

Until some change in the rule is wrought, a petition for writ of certiorari on the grounds alleged in this case will continue to be a useless exercise in futility for both the petitioner and this court.

Jackson J. concurs

Newland v. *State*, ... Ind ....., 236 NE2d 45, 46 (1968)

Other recent decisions of the Indiana Supreme Court demonstrate a continuing disposition to dispose of Constitutional questions by strained theories of implied waiver in spite of the dictates of *Fay* v. *Noia*, 372 U.S. 391 (1963), the companion case to *Lane* v. *Brown*, supra. In *Langley* v. *State*, infra, the Indiana Supreme Court

held that the appellant waived his right to raise the question of incompetence of counsel because his allegedly incompetent counsel did not raise the question in the original motion for new trial and in *Bucci* v. *State, infra,* the Indiana Supreme Court drew upon one of its decisions in 1960 in finding an implied waiver of Constitutional rights notwithstanding the intervening decision of this Court in *Fay* v. *Noia,* supra.

> The question of incompetency of trial counsel is not before this court because of the ruling of the trial court in refusing to grant permission to file a belated motion for new trial.
>
> *Langley* v. *State,* ..... Ind. ....., 232 NE 2d 611, 615 (1968)
>
> The appellants herein have not raised any Constitutional questions under Rule 2-6 of this Court and questions have not been raised under Rules 2-40 and 2-40A. This Court has held in *Green* v. *State* (1960), 241 Ind 96, 168 NE2d 345, that Constitutional questions are waived when they are not properly raised in a motion for new trial.
>
> *Bucci* v. *State,* ..... Ind ....., 237 NE2d 87 (1968)

All three of the above quoted decisions, *Bucci* v. *State,* supra, *Langley* v. *State,* supra, and *Newland* v. *State,* supra, have been or will in the near future be docketed in this Court on petition for certiorari. Respondent agrees with Petitioner's characterization of Indiana's post conviction remedies system as involving "important questions which deserve the attention and clarification of this Court." But certiorari should be granted in these other cases where the wrong has yet to be righted and not in this case where the dictates of justice already have been met. The Petitioner seeks to have this Court consign the Respondent and his fundamental rights to the jungle of

implied waivers and irrational technicalities which Indiana's post conviction remedies system has become. The "long series of cases" which Justice Hunter refers to and characterizes as "exercises in futility" in *Newland* v. *State,* supra, appear in the official reports of Indiana Decisions and they show almost no reversals of convictions or even considerations on the merits for Constitutional reasons. This lack of such reversals or even considerations evidences one of two things: 1) That criminal trial court procedure in Indiana is a model of Constitutionality where matters requiring reversal or even appellate consideration almost never occur or, 2) That the Constitution of the United States has become an almost meaningless document within the Indiana judiciary. The bizarre proceedings which took place prior to the Respondent's plea of guilty in this matter suggest that it is the latter circumstance that prevails.

For the reasons given it is respectfully submitted that certiorari should be denied.

William C. Erbecker
707 Hornblower Bldg.
129 E. Market St.
Indianapolis, Indiana 46204
Attorney for Respondent